No. 89-290 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE,

Petitioners,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

A. Whether the court of appeals' denial of reconsideration further in light of *Lingle v. Norge Division of Magic Chef, Inc.* presents a question warranting review?

B. Whether the court of appeals decided an issue warranting review when it held that a contractually mandated seniority system was bona fide under the Michigan Elliott Larsen Act, M.C.L.A. § 37.2211?

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STATEMENT OF THE CASE

Petitioners are former office clerical employees of Square Deal Cartage Company in Detroit which, prior to its sale to Cassens Transport, Inc. in August of 1977, engaged in the transportation of automobiles to local dealerships (App. p. 49a).[1]

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[1] References to "App. p." are to the appendix to the Petition for Writ of Certiorari in this matter.

Employees at Square Deal were represented by respondent Truck Drivers Local 299 in three seniority units: a combined drivers and yard unit, a garage unit and an office unit (App. p. 50a). At the time of the merger, Cassens had drivers and yard workers also represented by the respondent, but had no garage workers and its office workers were unrepresented and located at the company headquarters in Illinois (App. p. 50a).

Petitioners' employment at Square Deal was covered by the National Master Auto Transporters Agreement and Michigan Officers Supplement.[2] Under the agreement and supplement, office workers constituted a separate seniority unit. A senior laid off office employee could exercise seniority rights to gain employment at a different office but could not "cross bump" workers in the other non-office seniority units. (App. p. 59a). In the event of merger, the agreement provided a procedure for combination of seniority lists for like units, which maintained the separate unit system (App. p. 60a).[3] As a result, at the time of merger, the driver and yard units which existed at the two companies were merged. But, since there was no office unit at Cassens, petitioners were left jobless when their jobs were eliminated (App. p. 50a). Petitioners' efforts and those of their union to persuade Cassens management to retain them in some capacity were unsuccessful (App. p. 52a).

Petitioners initially brought this action against Cassens Transport and Respondent Teamsters Local 299, in the Circuit Court of Wayne County, Michigan. Petitioners' complaint alleges that they sought "bidding

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[2] The National Master Auto Transporters Agreement shall hereinafter be referred to as the "NMATA."

[3] Petitioners do not contest the court of appeals' construction of labor agreement as establishing a separate seniority unit system.

rights" at Cassens "in accordance with the seniority they had as employees of Square Deal" and that Local 299 failed to represent their interests in obtaining rights to yard jobs in negotiations or through the grievance procedure (App. p. 51a). This, petitioners maintained, was violative of state and federal law and denied petitioners equal opportunity in employment (App. p. 51a).

Respondent removed the action to the United States District Court for the Eastern District Court, asserting federal question jurisdiction under Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. After the district court's initial decision herein, petitioners settled their claims against Cassens Transport. On appeal, the Sixth Circuit Court of Appeals dismissed petitioners' federal claims against the union and remanded the pendent state claims. *Jones v. Truck Drivers Local 229*, 748 F.2d 1983 (6th Cir. 1984).

Following remand, the district court issued a second decision on September 17, 1985. Following the rationale of petitioners' pleadings, the district court construed the applicable labor agreements as providing cross bumping rights to petitioners (App. pp. 8a-14a). On the basis of its erroneous contract construction, the district court concluded that the union breached its duty of fair representation by failing to obtain cross bumping rights for petitioners (App. pp. 28a-31a). Such a breach of the duty of fair representation the court concluded violated Title VII and in turn the Elliott Larsen Act, M.C.L.A. § 37.2204(a), (App. p. 31a).

By decision issued February 3, 1988, the court of appeals for the Sixth Circuit reversed the district court's construction of the collective bargaining agreement, holding that the National Master Auto Transport Agreement and its supplements provided for separate bargaining unit seniority system which was protected by Michigan

law, M.C.L.A. § 37.2211. That system required that the union deal with petitioners in a separate unit with no right to transfer (App. pp. 59a-61a). The court of appeals held that a claim of sex discrimination against a union for failure to represent is governed by federal law. Additionally, because interpretation of the contract was necessary to determine the seniority and bargaining unit rights which petitioners sought, their claims were preempted by federal law (App. p. 57a).

Following issuance of the court of appeals' decision, petitioners filed a petition for rehearing en banc which was denied by the original panel on April 29, 1988. Two weeks later, on May 16, 1988, petitioners for the first time moved the court to stay proceedings pending the decision of the United States Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.*, cert. granted 108 S.Ct. 226 (1987).

After the Supreme Court issued its decision in *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988), the Sixth Circuit requested the parties submit additional briefs concerning the application of *Lingle* to the present case (App. pp. 92a-93a). Thereafter, on March 21, 1989, the court denied the motion to reconsider further in light of *Lingle* (App. pp. 94a-95a). Because of a misreference in the earlier order to appellants rather than appellees, an additional order was issued by the court on April 17, 1989, which denied reconsideration "after our examination of the parties' briefs regarding the panel's authority to consider and *Lingle's* impact on the present case" (App. p. 97a).[4]

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[4] Petitioners fail to acknowledge that the court's denial of reconsideration in light of *Lingle* was premised both on its analysis of *Lingle's* impact on the present case as well as its lack of authority to entertain petitioners' motion.

SUMMARY OF ARGUMENT

The petition herein seeks review of a court of appeals' decision that petitioners' state law claim is preempted because it is dependent upon interpretation of a collective bargaining agreement. That decision follows the holding of several decisions issuing from this Court. The question therefore does not present an issue warranting review.

Additionally, petitioners seek review of the court of appeals' application of the Michigan Elliott Larsen Act to the facts of the present case. The application of state law turning on the analysis of fact is not appropriately reviewed by this Court. Moreover, the decision of the court below is entirely correct.

The petition for writ of certiorari should therefore be denied.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DENIAL OF RECONSIDERATION FURTHER IN LIGHT OF *LINGLE v. NORGE DIVISION OF MAGIC CHEF, INC.* IS CORRECT AND DOES NOT WARRANT REVIEW.

A. Neither The Decision Nor The Record Below Raises The Question Presented In The Petition.

In raising the application of *Lingle v. Norge Division of Magic Chef*, petitioners fail to disclose that their claims against the union are premised directly on alleged seniority and bidding rights which are dependent on an interpretation of the applicable labor agreement.

Petitioners' complaint herein seeks seniority and bidding rights which, petitioners maintain, should have been provided to them through a negotiated labor agreement.

COUNT I:

> 11. Defendants, jointly and severally, *negotiated an agreement* to allow employees of Square Deal Cartage Company *to bid* on jobs at Cassens Transport *in accordance with the seniority* they had as employees of Square Deal Transport. That *said agreement* excluded Plaintiffs from such *bidding rights.* (emphasis added).

With elimination of their office jobs at Square Deal, petitioners sought jobs as "yard workers" at Cassens "in accordance with their seniority." [5] Thus, petitioners sought cross bumping rights from the office unit to the yard unit.[6]

It has long been recognized that seniority and bidding rights, such as petitioners claim herein, exist only to the extent they are established by a collective bargaining agreement, *Charlton v. Norge Division, Borg Warner Corp.*, 407 F.2d 1062 (6th Cir. 1969), cert. denied, 369 U.S. 871, citing *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). The seniority rights which form the basis of petitioners' claim, then, are completely dependent on contract construction.

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[5] The Complaint states:

> 7. On August 26, 1977, Plaintiffs were informed that their particular jobs at Square Deal Cartage Co. were being eliminated.
>
> 8. On or About August 30, 1987, Plaintiffs requested employment with Defendant Company, in accordance with their seniority, as "yard" workers. Defendant Company refused said request solely because Plaintiffs were women.

[6] As the court of appeals explains, cross bumping rights were not provided by the NMATA during mergers or at any other time.

> The contract does not envision that the event of a merger will allow office employees to do what they could not otherwise: cross-bump less senior employees from different bargaining units.

(App. p. 60a).

Here, the court of appeals found that petitioners' claims were dependent on interpretation of the labor agreement and were therefore preempted.

> Interpretation of the contract was necessary to determine seniority and bargaining rights in this case. Interpretation of the contract was also inextricably intertwined in the union's delicate problem of representing different bargaining units in the merger of the operations after Cassens' acquisition and merger. Interpretation and enforcement of the collective bargaining agreement is essentially and primarily a matter of federal labor law.

(App. p 57a).[7]

The issue raised in this case, then, is whether a state claim which is dependent upon interpretation of a labor agreement is preempted. As set forth below, the conclusion that contractually dependent claims are preempted is required by *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985) and is entirely consistent with *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988). This case therefore fails to present "an important question of federal law which has not been settled by this court" under Sup. Ct. R. 17.1(c).[8]

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[7] While the Sixth Circuit decision herein makes reference to an express non-discrimination section in the parties' labor agreement, the court's conclusion concerning preemption is not dependent on that setcion of the agreement. After mentioning the discrimination clause, the court goes on to explain that it was the necessary interpretation of the collective bargaining agreement which required preemption (App. p. 57a).

[8] Sup. Ct. R. 17 provides:

> 1. A review on writ on certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's dis-

B. The Court Of Appeals Herein Correctly Held That *Norge Division Of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988) Did Not Impact On Its Decision Herein.

The court of appeals held that because petitioners' claims to cross over seniority rights at Cassens required construction of the NMATA and supplements, they were preempted. This conclusion follows directly from the legal principles articulated in *Electrical Workers v. Hechler*, —— U.S. —— 107 S.Ct. 2161 (1987) and *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). It is not altered, but rather confirmed by *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988).

In *Lingle v. Norge Division of Magic Chef, supra*, the Supreme Court held that a state law claim which is established without reference to a collective bargaining agreement is not preempted by federal law under § 301 of Labor Management Relations Act. In reaching its conclusion, the court reaffirmed its holding in *Allis-Chalmers Corp. v. Lueck, supra*, that state claims which are dependent on construction of a collective bargaining agreement are necessarily preempted.

> *Lueck* faithfully applied the principle of Section 301 preemption developed in *Lucas Flour*: if the resolution of a state claim depended upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results such since there could be as many state law principles as there are states) is preempted on federal

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cretion, indicate the character of reasoning that will be considered....

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

> labor law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

108 S.C.t at 1881. Thus, the Court concluded "judges can determine questions of state law involving labor management relations *only* if such questions do not require construing the collective bargaining agreements." (emphasis added) 108 S.Ct. at 1884.

Here, the primary claim petitioners raise against the union is that they should have obtained cross bumping rights "in accordance with seniority." Those rights are established by a national labor agreement, the NMATA, and its supplements. Uniformity of contract interpretation requires absolute preemption of such claims. As this Court explained in *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962),

> More important, the subject matter of § 301(a) . . . 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

369 U.S. at 103. If the Michigan Elliott Larsen Act could be utilized to alter employees' bidding and seniority rights under the NMATA, negotiation and administration of such national agreements would be impossible.

Here, preemption is mandated not only because petitioners' state law claim is dependent on interpretation of a labor agreement, but additionally because petitioners' claims are essentially federal claims for breach of the duty of fair representation.

> We believe that *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985), is controlling here. The plaintiffs' action under state law is essentially the same as their claims under federal law against the union. . . . There were no new rights

> created under the Michigan law nor any new duty imposed upon the union not already present under existing federal law. As in *Maynard*, essentially the same claim for failure to represent was previously found to be time barred under federal law which applied. This kind of claim, a failure to represent *fairly*, is essentially a matter of federal law, 'an area of labor law which has been so fully occupied by Congress' as to foreclose or to preempt state regulation. *Id.* at 735.

(App. pp. 57a-58a).

It is the respondent's view that the only claims raised by petitioners against the union are those arising from their claim to cross bump from the Square Deal office to Cassens' yard work which, of necessity, require interpretation of the applicable labor agreement. If, *arguendo*, petitioners have alleged claims which are independent of the labor agreement, the court of appeals' decision has preserved such claims by remanding this action to the district court for determination of liability and "damages, if any" attributable to the union's alleged misconduct but not resulting from "implementation of the merger under the terms of the existing collective bargaining agreement" (App. p. 62a). Thus the court of appeals' decision, if anything, anticipates the precise distinction articulated in *Lingle*. "Judges can determine questions of state law involving labor management relations only if such questions do not require constrained collective bargaining agreements." 108 S.Ct. at 1884.

The preemption of petitioners' state law claims to cross over seniority is not altered by petitioners' articulation of those claims under a state anti-discrimination law which is coordinated with Title VII of the Civil Rights Act of 1964. As this Court found in *Lingle*, the distinction between state anti-discrimination claims and others is "unnecessary for determining whether § 301 preempts." 108 S.Ct. at 1885. The critical question is whether or not the

claim is dependent on interpretation of a labor agreement. Since petitioners' claim for cross-over seniority rights is based on interpretation of the seniority and merger provisions of the NMATA and supplement, it is therefore preempted.[9]

The task of determining whether preemption is compelled is the same whether applied to state anti-discrimination laws or any other state causes of action: "to ascertain Congress' intent" in enacting the federal statute. *Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983).[10] As the court explained in *Allis-Chalmers*, Congressional intent in enacting § 301 was to preempt interpretation of labor agreements absolutely. "In this situation, the balancing of state and federal interests required by *Garmon* preemption are irrelevant, since Congress, acting within its power under the Commerce Clause has provided the federal law must prevail." 85 L.Ed.2d at 217, footnote 9. Thus, state claims which require interpretation of a labor agreement are preempted without regard to the nature of the state law involved.[11]

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[9] The vast majority of state discrimination claims of employees covered by labor agreements will likely not require interpretation of labor agreements. It is only in the rare case, as here, that the claim of the employee is based on a right or duty which is established exclusively by contract that the claim is preempted. *Electrical Workers v. Hechler, supra.*

[10] It follows that state discrimination laws are preempted by federal law in accordance with the same standards generally applicable to the statutory scheme involved. *Maynard v. Revere, supra, Waukesha Engine Division v. Dept. of Ind.*, 619 F. Supp. 1310 (W.D. Wis. 1985), *BLE v. Industrial Comm.*, 604 F. Supp. 1417 (D. Utah, 1985).

[11] For example, in *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 cert. den. 6/12/89, 57 U.S.L.W. 3812, the First Circuit found a claim for violation of the right to privacy under Mass. Civil Rights Act was preempted because the claim required interpretation of a collective bargaining agreement to establish the employees bona fide expectations of privacy. See also *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988).

Petitioners' reliance on *Caterpillar v. Williams*, —— U.S. ——, 107 S.Ct 2425 (1987) is similarly misplaced. Initially, it must be noted that the language of petitioners' complaint establishes that their claim is for rights "in accordance with seniority" established by a collective bargaining agreement. After ten years and three appeals, it is too late for petitioners to assert their claims are not premised on a labor agreement. *Electrical Workers v. Hechler*, *supra*, 107 S.Ct. at 2168, footnote 5.

Moreover, even if, *arguendo*, the issue of interpretation arose only in defense, as petitioners now suggest, the principles of preemtpion would apply with equal force. In *Caterpillar v. Williams*, this Court held that a federal issue raised only in defense did not support *removal.*[12] The court specifically observed "we intimate no view on the merits of this or any of the preemption arguments discussed above." *Id.* at 2433, footnote 13. The Court noted that while the assertion of a federal issue in defense did not provide the basis for removal, it might well require a holding of § 301 preemption by the state court.

It is by now axiomatic that state law claims which require interpretation of a labor agreement are preempted. *Douglas v. American Information Technologies, Corp.*, 877 F.2d 565 (7th Cir. 1989); *Delapp v. Continental Can*, 868 F.2d 1073 (9th Cir. 1989); *Jackson v. Liquid Carbonic Corp., supra; Hanks v. General Motors*, 859 F.2d 67 (8th Cir. 1988); *Newberry v. Pacific Racing Association*, 854 F.2d 1142 (9th Cir. 1988); *Laws v. Calmat, supra; Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 850 F.2d 1155 (6th Cir. 1988).

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[12] Additionally, in *Caterpillar* the agreement under which plaintiffs' claims arose was not a collective bargaining agreement under § 301 but an individual employment contract between individual employees and the employer. Here the "agreement" referred to in the complaint is between the employer and union and is covered by § 301. Complaint ¶ 11, supra.

This case is but one more case in which state claims which depend on a labor agreement are preempted under the holding of *Electrical Workers v. Hechler, supra,* and *Allis-Chalmers v. Lueck, supra.* The court of appeals' decision is not altered but only confirmed by this court's decision in *Lingle v. Norge Division of Magic Chef, supra.* There is, therefore, no basis for review.

C. Petitioners Failed To Timely Raise The Application Of *Lingle v. Norge Division Of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988) In The Proceeding Before The Court Of Appeals.

Additionally, petitioners herein failed to timely preserve the question which is central to their petition for certiorari, the application of *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. ——108 S.Ct. 1877 (1988).

The court of appeals issued its decision herein on February 3, 1988. At the time *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) had been pending before this Court for more than three months, certiorari having been granted on October 13, 1987. 108 S.Ct. 226. Petitioner filed a timely petition for rehearing seeking reversal of the court's decision that plaintiffs' claims were preempted, but did not request a stay pending the anticipated decision in *Lingle.* On April 29, 1988, this court issued its decision denying plaintiffs' petition for rehearing en banc.

On May 12, 1988, plaintiffs filed a motion which, for the first time, requested stay of proceedings pending the decision of *Lingle* which had been pending before this Court since well before the court of appeals issued its decision or its denial of rehearing herein.

Fed. R. of App. P. 40 requires the petitions for rehearing be filed within 14 days of entry of judgment.[13]

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[13] Rule 40.(a) provides, "A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule."

Having declined to request a stay when certiorari was granted or even in the petition for rehearing, petitioners' motion raised for the first time after the denial of their petition for rehearing was untimely.

If parties were permitted to raise additional issues after petition for rehearing had been denied, there would be no practical end to appellant consideration. New court decisions having some peripheral or arguable relevance could provide a basis for dilatory request for reconsideration. "F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel." *United States v. Doe*, 455 F.2d 753,, 762 (1st Cir. 1972), vacated on other grounds sub nom. *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Williams*, 499 F.2d 52, 56 (1st Cir. 1974).

The court of appeals' decision to deny reconsideration in light of *Lingle* is correct, both because the decision has no impact on the present case and was not timely raised. There is no special or important reason warranting its review.

II. THE COURT OF APPEALS' DECISION THAT THE CONTRACTUALLY MANDATED SEPARATE UNIT SENIORITY SYSTEM WAS BONA FIDE UNDER THE MICHIGAN ELLIOT LARSEN ACT M.C.L.A. § 37.2211 IS CORRECT AND DOES NOT WARRANT REVIEW.

A. The Question Raised By The Petition Does Not Warrant Review.

Petitioners ask this Court to interpret a Michigan state law in light of their allegations that the evidence here does not meet a four-part test for a bona fide seniority system under federal law. In so doing, petitioners ask the court to resolve conflicting interpretations of the evidence in their favor. This is not an appropriate basis for review by this Court. *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 503 (1951). Additionally, the petition seeks review of a ques-

tion of state law. Sup. Ct. R. 17 makes no reference to such review.[14] There is simply no valid basis for the review sought by the petition.

The fact petitioners seek review of the seniority system itself underscores the premise of petitioners' claim: that the contractual seniority system be reconstructed to permit their cross bumping between bargaining units. Such a claim is preempted by federal law. Alternatively, it is foreclosed by the court of appeals' construction of the existing labor agreement. That construction cannot be indirectly reversed at this juncture by rearguing the application of state law to the particular facts of this case.

B. The Court Of Appeals' Decision Is Correct.

The court of appeals correctly held that the Michigan Elliott Larsen Act, M.C.L.A. § 37.2211 protected the separate seniority system established by the NMATA as applied to the Square Deal-Cassens merger.

Petitioners assert that the seniority system in effect at Square Deal permitted cross bumping between positions held by men and otherwise favored men over women. These are issues of fact and are therefore not the basis of review by this Court. Additionally, the decision of the court of appeals carefully addressed the very issues petitioners raise. The court specifically found that there was no evidence of cross bumping between the office and other bargaining units, rather, the prohibition of cross bumping was maintained consistent with the labor agreement.

> [I]t is clear that the office unit was never allowed to cross bump into non-office jobs. Custom and practice therefore reinforced the clear language of the contract provision in prohibiting office workers from

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[14] Notably, the language of Rule 17 deletes the references in its predecessor, Rule 19, to review when a federal court of appeals "has decided an important state or territorial qusetion in a way in conflict with applicable or state or territorial law." Sup. Ct. R. 19 (1970).

> cross bumping, and the office workers had no right to bid for non-office jobs either before or after the merger.

(App. p. 60a).

Once it is recognized that the office bargaining unit maintained separate seniority, there is no basis for the claims that the seniority system fails to meet the *James v. Stockham Valve & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977) cert. den. 434 U.S. 1034 (1978) standard. The system did operate to discourage all employees equally from transferring between units. The office workers did constitute a separate bargining unit (App. p. 59a). There is no holding below nor evidence that the system had its genesis or was maintained for an illegal purpose.[15]

In fact, the separate unit seniority system at issue is established by the NMATA and its supplements which, together with its sister agreement, the National Master Freight Agreement, have been repeatedly recognized as bona fide. *Teamsters v. United States*, 431 U.S. 324 (1978); *Salinas v. Roadway Express, Inc.*, 735 F.2d 1574 (5th Cir. 1984); *Freeman v. Motor Convoy*, 700 F.2d 1339 (11th Cir. 1983); *Wiggins v. Spector Motor Freight System*, 583 F.2d 882 (6th Cir. 1978); *United States v. East Texas Motor Freight*, 564 F.2d 179 (5th Cir. 1977). See also *Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986).

Petitioners' argument reduces to the claim that women who worked in the office were not as well compensated as drivers and yard workers. However, such differentials resulting from a separate seniority unit system are protected from challenge under the Michigan Elliott Larsen Act by M.C.L.A. § 37.2211, just as such differentials are

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[15] As the court of appeals noted, "there is nothing in the record that plaintiffs' opposed adoption of the collective bargaining agreement when consumated by the employer and the union. No grievance was filed by plaintiffs prior to effectuation of the merger." (App. p. 58a).

protected by § 703(h) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000(e)-2(h).[16] As the court of appeals noted here, "the defense interposed by a bona fide seniority system would allow differences in compensation or terms, conditions or privileges of employment arising from the operation of seniority system." (App. p. 60a-61a). This holding is consistent with principles established by this court concerning parallel protection of seniority systems provided under § 703(h) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2(h). *Teamsters v. United States*, 431 U.S. 324 (1977); *American Tobacco v. Patterson*, 456 U.S. 63 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

The court of appeals' holding that separate unit seniority system mandated by the NMATA was protected by M.C.L.A. § 37.2211 is correct and does not raise any issue warranting review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[16] M.C.L.A. § 37.2211 provides, "Notwithstanding any other provision of this article, it shall not be an unlawful employment practice for an employer to apply different standards of compensation where different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system."